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PP

v.

PRABU VEERAMUTHU & ORS

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COURT OF APPEAL, PUTRAJAYA

SURIYADI HALIM OMAR JCA

HASAN LAH JCA

AHMAD MAAROP JCA

[CRIMINAL APPEAL NO: N-05-170-2008]

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12 JULY 2010

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CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Concurrent or consecutive - Governing principles - One transaction rule and totality principle - Whether exception to rule applied - Penal Code, s. 304*

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The trial judge imposed concurrent sentences against the respondents for two offences of murder under s. 304(a) of the Penal Code. The respondents were each sentenced to 16 years' imprisonment for each offence. The facts showed that the respondents waylaid their two victims who were in a stationary car before robbing and murdering them in separate places. Both victims were stabbed in the stomach and slashed in the neck with a knife. The Deputy Public Prosecutor appealed on the ground that the sentences imposed by the trial judge should be made to run consecutively instead of concurrently.

Held (allowing the appeal)

Per Hasan Lah JCA delivering the judgment of the court:

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(1) The principles governing the imposition of concurrent or consecutive sentences were laid down in *Bachik Abdul Rahman v PP*. In that case, it was held that the court should be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences were committed in the course of one transaction, all sentences in respect of those offences should be concurrent rather than consecutive. For there to be one transaction, there must be four elements present, *ie*, proximity of time, proximity of place, continuity of action and continuity of purpose or design. The one transaction rule, however, was not absolute. The court in

the *Bachik* case established and applied an exception to the rule where consideration was to be given to the severity of the offences committed by the accused. (para 12)

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- (2) The two offences committed by the respondents were very serious. The present case involved two separate, distinct offences and two different victims. The injuries inflicted on the victims were vicious and called for an outright condemnation. There was no provocation by the hapless victims. This was a proper case for the court to apply the exception to the one transaction rule. A consecutive sentence was necessary to discourage others from committing violent crimes affecting the human body resulting in death. (para 16)

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- (3) The trial judge had not given sufficient consideration to the facts of the case and the circumstances of the offences in considering whether to impose a concurrent or a consecutive sentence. In the circumstances, having come to the conclusion that the trial judge erred in imposing a concurrent sentence, there was no alternative but to intervene and order that the two sentences run consecutively. (para 18)

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Bahasa Malaysia Translation Of Headnotes

Hakim bicara mengenakan hukuman bersama terhadap responden-responden bagi dua kesalahan membunuh di bawah s. 304(a) Kanun Keseksaan. Responden-responden dikenakan enam belas tahun pemenjaraan bagi setiap kesalahan masing-masing. Fakta menunjukkan bahawa responden-responden menghadang dua orang mangsa yang berada di dalam sebuah kereta yang berhenti sebelum merompak dan membunuh mereka di tempat berlainan. Kedua-dua mangsa di tikam di perut dan di selar di leher dengan sebilah pisau. Timbalan Pendakwa Raya merayu atas alasan bahawa hukuman-hukuman yang dijatuhkan sepatutnya berjalan berturutan dan bukan bersama.

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Diputuskan (membenarkan rayuan)

Oleh Hassan Lah HMR menyampaikan penghakiman mahkamah:

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- (1) Prinsip-prinsip terpakai bagi hukuman-hukuman bersama atau berturutan diperkukuhkan dalam kes *Bachik Abdul Rahman v. PP*. Kes tersebut memutuskan bahawa mahkamah mesti berpandukan rukun satu transaksi dan prinsip keseluruhan.

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- A Berikutan rukun satu transaksi di mana dua atau lebih kesalahan dilakukan dalam masa satu transaksi, semua hukuman-hukuman berkaitan kesalahan-kesalahan tersebut mesti berjalan berturutan dan bukan bersama. Transaksi tersebut mesti mempunyai empat elemen, iaitu kedekatan masa dan tempat,
- B kesinambungan tindakan dan kesinambungan niat atau tujuan. Namun, rukun satu transaksi itu tidak mutlak. Mahkamah di *Bachik* mengukuhkan dan memakai pengecualian kepada rukun ini di mana pertimbangan diberikan kepada kekerasan kesalahan-kesalahan yang dilakukan oleh tertuduh.
- C (2) Kesalahan-kesalahan yang dilakukan oleh responden-responden dalam kes semasa adalah serius. Kes semasa melibatkan dua kesalahan yang berasingan, ternyata dan dua mangsa berlainan. Kecederaan-kecederaan yang dikenakan atas mangsa-mangsa
- D adalah kejam dan patut diberikan kutukan kuat sekali. Tiada hasutan daripada mangsa-mangsa yang malang itu. Ianya adalah kes sesuai untuk mahkamah memakai pengecualian kepada rukun satu transaksi itu. Suatu hukuman berturutan wajar dikenakan supaya tidak menggalakkan orang lain daripada
- E melakukan jenayah-jenayah kejam atas tubuh manusia yang membawa kematian.
- (3) Hakim bicara tidak memberi pertimbangan mencukupi kepada fakta-fakta kes dan keadaan keseluruhan kesalahan-kesalahan yang dilakukan dalam memberi pertimbangan sama ada untuk mengenakan hukuman bersama atau berturutan. Dalam keadaan sedemikian, dengan menyimpulkan bahawa hakim bicara terkhilaf dalam mengenakan hukuman-hukuman bersama, tiada alternatif tetapi untuk bercampurtangan dan memerintahkan hukuman-hukuman tersebut berjalan berturutan.
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Case(s) referred to:

Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA (*refd*)

Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 (*refd*)

Ganesan Nachiappan & Ors v. PP [2000] 3 CLJ 302 CA (*refd*)

H *PP v. Loo Choon Fatt* [1976] 1 LNS 102 (*refd*)

R v. Skinner [1966] & Cr App R 166 (*refd*)

R v. Wheatley [1983] 5 Cr App R 417 (*refd*)

Sau Soo Kim v. PP [1975] 2 MLJ 134 (*refd*)

Yit Kean Hong v. PP [2005] 4 CLJ 592 CA (*refd*)

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Legislation referred to:

Penal Code, ss. 302, 304(a), 307

For the appellant - Siti Rafidah Zaimuddin DPP

Respondents in person

[Appeal from High Court, Seremban; Criminal Trial No: 45-3-2005]

[Editor's note: For the High Court judgment, please see PP v. Prabu Veeramuthu & Ors [2009] 9 CLJ 470.]

Reported by Usha Thiagarajah

JUDGMENT**Hasan Lah JCA:**

[1] The three respondents were initially charged with two offences under s. 302 of the Penal Code. The prosecution then tendered amended alternative charges under s. 304(a) of the Penal Code. All the three respondents pleaded guilty to the alternative charges, which are as follows:

First amended alternative charge:

Bahawa kamu pada 28 Julai 2004 antara jam lebih kurang 12.30 tengah malam hingga 7.40 pagi, di Terusan, Mukim Juaseh di dalam Daerah Kuala Pilah dalam Negeri Sembilan, bagi mencapai niat bersama kamu semua telah menyebabkan kematian ke atas Chong Pui Wan (No. K/P: 861204-59-5128) dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah Seksyen 304(a) Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

Second amended alternative charge:

Bahawa kamu pada 28 Julai 2004 antara jam lebih kurang 12.30 malam hingga 2.15 pagi, di kawasan tangki air, Taman Meranti, Bahau, di dalam Daerah Jempol, dalam Negeri Sembilan, bagi mencapai niat bersama kamu semua telah menyebabkan kematian ke atas Puk Chia Wen (No. K/P: 850407-05-5021) dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah Seksyen 304(a) Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

- A [2] The respondents were each sentenced to 16 years' imprisonment on each charge and the sentences were ordered to run concurrently from the date of their arrests. The Public Prosecutor appealed against the sentences imposed on the respondents.
- B [3] In the argument before us the learned Deputy Public Prosecutor raised only one issue, that is, the sentences of imprisonment should be made to run consecutively and not concurrently.
- C [4] The facts of this case are straight forward. At about 12.30am on 28 July 2004 the two deceased were waylaid by the three respondents while they were inside a stationary car at a hilly area in Taman Meranti, Bahau, Daerah Jempol, Negeri Sembilan. The three respondents went there with the intention of committing a robbery and they brought a knife with them. Puk Chia Wen (the first deceased) was ordered to get out of the car while a knife was placed at his neck. The three respondents took the first deceased to a place nearby where they robbed him of his wallet, mobile phone and a ring. While robbing the first deceased they tied his hands and his mouth with a T-shirt cloth. They stabbed his stomach and slashed his neck with the knife. They left the first deceased there. The first deceased's body was found by a member of public at about 2.45am on the same day by the roadside.
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- F [5] The three respondents then went back to the car and pushed Chong Pui Wan (the second deceased) to the back of the car. They got into the car and one of them drove the car to Terusan, Mukim Juaseh, Kuala Pilah. On arrival at the place they took her out of the car. They stabbed her stomach and slashed her neck with the same knife. They put her body inside the boot of the car and drove the car to a nearby lake. They tried to push the car into the lake but they were unable to do it. They left the car there and threw the knife into the lake. They took the second deceased's mobile phone and ring. At about 7.40am the second deceased's body was found floating in the lake.
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- H [6] A post-mortem report on the first deceased prepared by Dr. Mohamad Azaimi bin Ibrahim, a Forensic Pathologist attached to Hospital Melaka states, *inter alia*:

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- (a) There was an incised wound over the neck. There were stab wounds over the abdominal region. Other injuries in the form of abrasions and bruises were seen on the body and limbs of the deceased. A
- (b) Internal examination showed a severed trachea and veins of the neck. There were injuries to the stomach and its omentum and to the right kidney as a result of the stab wounds over the abdomen. B
- [7] With regard to the second deceased the post-mortem report, which was prepared by the same pathologist, states, *inter alia* that: C
- (a) There was an incised wound on her neck severing the left common carotid artery, the left jugular vein and the trachea. There was also a stab wound to the abdomen that did not injure any vital structures. D
- (b) The injuries to the structures in the neck were fatal.
- [8] At the time of the commission of the offences the first respondent was 18 years and five months, the second respondent was 18 years and 11 months and the third respondent 16 years and 11 months. E
- [9] The issue before us was whether the sentences imposed by the learned trial judge should be made to run consecutively. The learned Deputy Public Prosecutor submitted *inter alia* that the learned trial judge erred in law in ordering the sentences to run concurrently because the respondents had committed two distinct offences. It was also submitted that based on the facts of the case the two sentences of imprisonment should be made to run consecutively. F G
- [10] The learned trial judge ordered the two sentences to run concurrently from the date of their arrests on the ground that the two offences committed by the respondents were all carried out in one single transaction. In paras. 9 and 10 of his judgment the learned trial judge said: H
9. The one transaction principle would see four elements present, namely, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v. PP* [1979] 1 LNS 36; [1979] 2 MLJ 88; *Amrita Lai Hazra v. Emperor* 42 Cal 957; *Chin Choy v. PP* [1955] 1 LNS 17; [1955] MLJ 236). I

- A 10. In the present appeal, the two offences committed by the Respondents were all carried out in one single transaction in the wee hours of 28 July 2004. There was proximity of time in that the first victim was earlier murdered to the second victim, though at places not distant between each other (a 15 minute drive) when the latter was driven in the car to the other location where she was then later murdered by the Respondents in their continuity of criminal action and purpose or design.
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- C [11] In an appeal against sentence an appellate court would not disturb the sentence imposed unless the trial court had erred in applying the correct principles of sentencing or had embarked on some unauthorized or extraneous exercise of discretion (see *Ganesan Nachiappan & Ors v. PP* [2000] 3 CLJ 302; *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102; *Bhandulananda Jayatilake v. Public Prosecutor* [1981] 1 LNS 139 and *Yit Kean Hong v. PP* [2005] 4 CLJ 592).
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- E [12] In *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572 Augustine Paul JCA at p. 579 stated the principles governing the imposition of concurrent or consecutive sentences as follows:

- F [7] The combined effect of s. 282 and s. 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see *Ooi Sim Yim v. Public Prosecutor* [1990] 1 CLJ 435; [1990] 1 CLJ (Rep) 223). The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date, the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive (see *R v. Saleem* [1964] Crim LR 482; *R v. Walsh* [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v. Public Prosecutor* [1979] 1 LNS 36; *Amrita Lal Hazra v. Emperor* 42 CAL 957; *Chin Choy v. Public Prosecutor* [1955] 1 LNS 17). The rule, however, is not absolute. As Yong Pung How CJ said in *Kanagasuntharam v. Public Prosecutor* [1992] 1 SLR 81 p 83:
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The English courts have recognized that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v. Faulkner* [1972] 56 Cr App R 594, *R v. Wheatley* [1983] 5 Cr App R (S) 417 and *R v. Skinner* [1986] 8 Cr App R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticized as vague, it is necessarily in such terms in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.

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Further down, the learned judge at p. 582 observed:

[14] It must be remembered that both the offences were executed in the same manner and are of the same severity and are unrelated. It cannot be denied that the cumulative effect of both the sentences will have a crushing effect on the accused bearing in mind his age. But this effect must be balanced against the seriousness of the offences committed by him and the need to protect young females from him. The order made by the High Court in upholding the direction of the sessions court on the commencement of the jail term imposed in this case is therefore correct in law and we are unable to interfere.

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[13] In *Yit Kean Hong's* case the appellant, who was originally charged with two offences, ie, murder under s. 302 of the Penal Code and attempted murder under s. 307 of the Penal Code, pleaded guilty to both the amended charge of culpable homicide under s. 304 (first limb) of the Penal Code in respect of the first charge and to the second charge, which remained as it was. The appellant had admitted to causing the death of one Lew Kuan Fook by pouring petrol on him and setting him on fire, and attempting to murder one Lew Kong Loy by cutting his throat several times with a knife. The learned High Court judge, after considering the mitigating factors put forward by the appellant, sentenced him to 15 years' imprisonment for both offences respectively and ordered both sentences to run consecutively. The appellant, dissatisfied with the sentences imposed, appealed. He contended that the sentences of imprisonment were manifestly excessive and that they should be made to run concurrently, and that he was not given credit for pleading guilty to the charges.

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A [14] With regard to the order that both sentences to run consecutively Nik Hashim JCA, delivering the judgment of the Court of Appeal at p. 603 said:

B It appears from *Bachik's* case that the Court of Appeal, in upholding the consecutive term of imprisonment imposed by the Sessions Court, had applied the exception to the one transaction rule and the totality principle in that it took the facts of the case and the circumstances of the offence into consideration in reviewing the sentences. The offences committed by the accused in that case were of the same severity and unrelated and therefore deserving a deterrent sentence.

C Similarly, in the present case, the two offences committed by the appellant were very serious indeed each punishable with imprisonment of up to 20 years. Like the case of *Yap Huat Heng, supra*, the present case also involved two distinct offences and two different victims. On the facts, the second charge of attempted murder was not really subsidiary to the first charge of culpable homicide, although the two offences were committed in the course of a single transaction. The victims suffered two different types of injuries and the methods of inflicting them on the two victims were also different from each other. Even learned counsel for the appellant conceded before us that the facts against the appellant were bad.

D [15] In his judgment the learned trial judge referred to the Court of Appeal decision of *Yit Kean Hung* and said:

F 13. It is evident that the injuries inflicted upon the victims in that one transaction are remarkably similar and so too the causes of death as opined by the Forensic Pathologist (see P17 and P18). The injuries inflicted in the course of the robbery would call for an outright condemnation as to its severity. I would pause here to add that the learned Deputy Public Prosecutor had strenuously argued that while conceding that the crimes were committed in one transaction, she had in the same urged the Court that consecutive sentences be imposed. The closest and most heavily relied authority that she proffered is the Court of Appeal decision of *Yit Kean Hong v. PP* [2005] 4 CLJ 592. The Appeal Court therein had affirmed the consecutive sentence imposed by the trial court. Upon a closer scrutiny it can be said that the facts of that case differ and are quite distinguishable from the present one before me. In that case the offences were distinct. The first victim survived the ordeal despite slash wounds to the neck while the second

victim was set on fire and died of “septicaemia secondary to 60% burns.” In coming to a decision, the Court of Appeal therefore did not depart from the principles of concurrent and consecutive sentencing. “The victims suffered two different types of injuries and the methods of inflicting them on the two victims were also different from each other”, per Nik Hashim JCA (as he then was). On the above authority, this Court would therefore consistently follow and be guided thereby.

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[16] The Court of Appeal in *Bachik*’s case and *Yit Kean Hong*’s case had clearly applied the exception to the one transaction rule and the totality principle in that it took the facts of the case and the circumstances of the offence into consideration in reviewing the sentences. Like the facts in *Yit Kean Hong*’s case the two offences committed by the three respondents in the present case were very serious indeed punishable with imprisonment of up to 20 years. This case involved two separate and distinct offences and two different victims. The injuries inflicted on the victims in the present case, as rightly stated by the learned trial judge, were vicious and would call for an outright condemnation. There was never any provocation by the hapless victims. In our view this is a proper case for the court to apply the exception to the one transaction rule. In addition, a consecutive sentence is necessary to discourage others from committing violent crimes affecting the human body resulting in death.

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[17] In *Sau Soo Kim v. Public Prosecutor* [1975] 2 MLJ 134 Lee Hun Hoe CJ (Borneo) said that the question whether the sentences should run consecutively or concurrently must depend upon the particular circumstances of the case. The one transaction rule is not absolute as there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished (see *R v. Wheatley* [1983] 5 Cr App R 417 and *R v. Skinner* [1966] & Cr App R 166).

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[18] In our view the learned trial judge had not given sufficient consideration to the facts of the case and the circumstances of the offences in considering whether to impose a concurrent or a consecutive sentence. In the circumstances, having come to the conclusion that the learned trial judge had erred in imposing a concurrent sentence as he did, we had no alternative but to intervene and order that the two sentences to run consecutively.

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